ABANDONED CRIMINAL ATTEMPTS: AN ECONOMIC ANALYSIS

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ABSTRACT

An attempt is ‘abandoned’ if the criminal, despite having a chance to continue with his criminal plan, forgoes the opportunity to do so. A regime that makes abandonment a defense to criminal attempts provides an incentive to the offender to withdraw from his criminal conduct prior to completing the previously intended offense. However, the same regime may induce offenders to initiate criminal plans more often by reducing the expected costs associated with such plans. The former effect is called the marginal deterrence effect and the latter is called the ex-ante deterrence effect of the abandonment defense. This Article formalizes a trade-off between marginal and ex-ante deterrence by using standard economic analysis. The analysis suggests, contrary to the principles encapsulated by existing legal regimes, that all abandoned attempts, voluntary and involuntary alike, ought to potentially be punished less severely than completed attempts. Furthermore, an abandonment need not be treated as either a full excuse or no defense at all; optimal punishment schemes require abandonments to be treated as mitigating factors in sentencing. The Article then identifies two important factors that ought to be taken into consideration while determining the magnitude of mitigation: the foreseeability of the events that led to the abandonment and the information regarding the offender's dangerousness that is revealed.

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through the abandonment. Finally, existing laws on abandonment are briefly reviewed. This review reveals that there is significant variation among states, and that there are cases where courts (i) excuse abandoning defendants even when the law does not provide an abandonment defense, and (ii) punish abandoning defendants even where a strict reading of the law would require the defendant to be excused. I conclude by suggesting that deviations from strict readings of the law can be minimized by moving more closely towards the optimal punishment schemes identified in this Article.
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INTRODUCTION

Attempters 1, 2, and 3 set out to execute very similar crimes: each has the goal of shooting his respective victim with a sniper rifle. Each attempter, at different times and locations, spots his respective victim at home and has a clear shot at shooting the victim through one of the house windows.

Attempter 1 pulls the trigger without hesitation, but, unbeknownst to him, the window is bullet-proof. Unsuccessful at his attempt at murdering his victim, Attempter 1 withdraws from the crime scene. This action, which I call Attempt 1, constitutes a completed attempt, because Attempter 1 has taken all necessary steps to accomplish his crime, but he has failed due to external factors.

Attempter 2, before pulling the trigger, notices a number of surveillance cameras around the victim’s house, and decides to abandon his criminal plan. This action, which I call Attempt 2, constitutes an abandoned attempt, where the abandonment is presumably motivated by the desire to avoid a high likelihood of detection.

 Attempter 3, while looking at his victim through his rifle’s scope to get an accurate aim, suddenly feels a sense of sympathy, compassion and mercy towards his victim. He prays for forgiveness, abandons his plan and walks away from the scene. This action, which I call Attempt 3, constitutes an abandoned attempt, where the abandonment is motivated by a true change of heart.

The three scenarios described above all constitute attempted murder. Despite this, many people intuitively feel that the would-be murderers in each scenario ought to be treated differently. Is there a sound basis, beyond simple intuition, supporting this normative view? In this article I demonstrate that the objective of optimal crime prevention through deterrence and incapacitation suggests that all

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1 This Article provides a consequentialist analysis that uses the tools of law and economics. It does not provide an analysis of retributive justice considerations. See also infra note 35 and
three attempts ought to be punished differently. In particular, abandoned attempts (i.e. Attempts 2 and 3) ought to be punished less severely than completed attempts, and Attempt 3 ought to be punished less severely than Attempt 2 based on the distinct nature of the events that led to abandonment in these two scenarios and what it tells about the attempter’s likelihood of recidivating.

Contrary to what my analysis suggests, many jurisdictions either do not distinguish among any of the three types of attempts, or treat Attempts 1 and 2 similarly but distinguish them from Attempt 3. Furthermore, most jurisdictions either fully excuse an abandoned attempt or do not provide a defense at all. Perhaps due to these features of the law decision makers occasionally bend or aggressively interpret the law to produce outcomes that comport more with their intuitive notions of justice. This type of behavior can be interpreted as a symptom of the sub-optimality of the current state of the law of accompanying text for a more detailed description of the particular consequentialist methodology used in this Article.

2 See, e.g., Sanford H. Kadish et al., Criminal Law and Processes: Cases and Materials 557 (8th ed. 2007) (“the law traditionally denied any defense of abandonment, and many courts continue to adhere to that view.”) (citing State v. Robins, 646 N.W.2d 287, 295 (Wis. 2002) and People v. Herman, 97 Cal. App. 4th 1369, 1389 (2002). See also infra notes 21-30 and accompanying text.

3 See Dressler, Understanding Criminal Law 411 (Louis H. Higgins ed., 5th ed. 2009) (“To the extent that a defense of abandonment is recognized today, however, it applies only if the defendant voluntarily and completely renounces her criminal purpose.”); see also Paul H. Robinson, Criminal Law Defenses 348-49 (1984) (“abandonment type defenses] require that the renunciation have been made at a time and under conditions that suggest a voluntary and complete change of heart rather than, for example, a change in the actor’s assessment of the likely success of the criminal plan.”); Wayne R. LaFave, Criminal Law 607 (4th ed. 2003) (“The cases are in agreement that what is usually referred to as involuntary abandonment is no defense.”).

4 See, e.g., Kadish et al., supra note 2, at 557 (“A number of states have [recognized abandonment as a complete defense] either by statute or judicial decision.”); Daniel Moriarty, Extending the Defense of Renunciation, 62 Temp. L. Rev. 1 (1989) (“Renunciation is a defense that allows a person who has committed a crime to abandon or renounce his or her criminal enterprise and thereby extinguish any previously incurred criminal liability.”); see also Francisco Muñoz Conde, “Rethinking” the Universal Structure of the Law, 39 Tulsa L. Rev. 941, 945 (2004) (referring to “the exemption from liability recognized in all the modern codes for the voluntary abandonment of the criminal plan before the harm occurs.”).

5 See, e.g., Melvin Aron Eisenberg, The Nature of the Common Law (1988) (observing that courts may engage in this type of behavior: “The courts use several different techniques to give effect to the institutional principle that an announced rule that substantially fails to satisfy the standards of social congruence and systemic consistency should not be consistently applied and extended. Perhaps the most common of these techniques is to draw distinctions, in the form of exceptions, that seem plausible in form but are in substance either inconsistent with the announced rule, given the social propositions that support the rule, or impossible to administer in such a way that cases are treated in a consistent fashion.” Id. at 71.) See infra Part V.A. illustrating through examples how courts have aggressively interpreted attempt laws in abandonment cases.
attempts, which I argue can be remedied by the use of penalty mitigations for abandonments.

The law and economics (“L&E”) literature has not fully and formally studied the various types of attempts either: virtually all previous studies of attempts mainly focus on attempts generally, and distinguish between, for instance, completed attempts and abandoned attempts only while considering implications of their main analyses. Neither has the non-L&E scholarship generated a comprehensive analysis identifying specific trade-offs between the costs and benefits of

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7 See sources cited in supra note 6. As noted in Shavell, Punishment of Attempts, supra note 6, Beccaria took a similar approach in 1767: see CESARE BONESARIA BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 153 (1st ed. 1767) (“as there may be an interval of time between the attempt and the execution, it is proper to reserve the greater punishment for the actual commission, that even after the attempt there may be a motive for desisting.”).

8 See Shavell, Punishment of Attempts, supra note 6, Kramer, supra note 6, and Ben-Shahar, supra note 6 (commenting on the possibility of recognizing abandonment as a factor affecting sanctions, these articles do not specifically model how penalty mitigations for abandoned attempts can affect the trade-off between marginal and ex-ante deterrence as is done in Part III.D. infra as a result, they do not comment on the importance of the foreseeability of the events causing the abandonment, which is an issue covered in Part IV.A. infra).
having an abandonment defense. As a result of the lack of a systematic and sophisticated study of different types of attempts, there appears to be an under-appreciation of the trade-off between what I call the marginal deterrence and ex-ante deterrence effects of punishment schemes for attempts.

From a consequentialist perspective, the key difference between a completed attempt and an abandoned attempt is in the risk created by each. A completed attempt creates a risk of social harm beyond that which is created by an abandoned attempt. Therefore, if by punishing abandoned attempts less severely punishment schemes can induce offenders to withdraw from their criminal conduct, this could reduce social harm. If a punishment scheme deters the completion of the crime, but not its initiation, then that punishment scheme is said to achieve marginal deterrence.

Unsurprisingly, however, the strategy of punishing abandoned attempts less severely creates a problem. Consider a punishment scheme fully excusing offenders who abandon their crimes. If this strategy was in place, it would be costless for a potential offender to initiate a criminal plan, and abandon it if after scoping out the scene and observing an unexpected number of police officers, he determines that he is likely to be detected and convicted. This would make the

9 Despite identifying various important functions of penalty reductions for abandonments, including marginal deterrence and separating between dangerous and non-dangerous offenders, the non-L&E articles do not formalize the trade-off between marginal and ex-ante deterrence, and therefore are unable to point out the importance of foreseeability of the abandonment as an important factor in the determination of the appropriate penalty for abandoned attempts. See, e.g., Evan Tsen Lee, Cancelling Crime, 30 CONN. L. REV. 117 (1997); Gideon Yaffe, Attempt, Risk-Creation and Change of Mind: Reflections on Herzog, 9 OHIO ST. J. CRIM. L. 779 (2012); Paul R. Hoeber, The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation, 74 CAL. L. REV. 377, 383 (1986); Moriarty, supra note 4; M. H. Crew, Should Voluntary Abandonment Be A Defense To Attempted Crimes?, 26 AM. CRIM. L. REV. 441 (1988); Richard G. Gervase, Grading Criminal Attempts—A Proposed Solution for Statutory Reform in Sentencing, 20 RUTGERS L.J. 479 (1989).

10 The more general theme of ex-ante versus ex-post effects, or static versus dynamic efficiencies, has, of course, been analyzed in various contexts in the law and economics literature. Many economic analyses of patent and antitrust laws, for instance, focus on the necessity of sacrificing static efficiencies to generate dynamic efficiencies. Trade-offs between ex-ante and ex-post effects have also been identified in analyses of criminal law, see, e.g., Abon Harel, Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault, 82 CAL. L. REV. 1181, 1213-1217 (1994) (explaining how the desirability of recognizing a defense of provocation in homicide cases depends on its ex-ante and ex-post incentive effects.)

11 See infra Part II.A defining and explaining marginal deterrence in further detail.

12 Costs here refer to the additional expected cost of punishment and therefore exclude the costs of preparation.
initiation of criminal plans a much better bet; if completing the crime turns out to have a positive expected return the criminal completes it, if it has a negative expected return, he abandons it and gets off for free. Therefore, the average return from initiating a criminal plan would be positive, and many potential offenders would be induced to commit crimes. This is why fully excusing offenders for abandoning criminal attempts has a negative effect on ex-ante deterrence, which refers to the discouraging of criminal acts at the initiation stage.\textsuperscript{13}

In this Article, I first focus on the trade-off between the marginal deterrence and ex-ante deterrence effects of providing penalty reductions for abandoning of attempts. I first develop a benchmark model of deterrence and rational decision making, and show that reducing the penalty for abandoned attempts can reduce crime by generating a marginal deterrence effect that more than offsets the reduction of the ex-ante deterrence effect. This suggests that completed and abandoned crimes ought to be treated differently in our criminal justice system, and that abandoning of attempts should, at a minimum, be taken into account as a potentially mitigating factor. This reasoning explains why Attempt 1 should be treated differently than Attempt 2 and Attempt 3.

I then consider what factors ought to be taken into consideration in determining the appropriate penalty reduction. One important factor is the foreseeability of the event that causes the offender to abandon his crime. The way the criminal is punished after abandoning due to unforeseeable\textsuperscript{14} events should not have an important effect on his decision to initiate a criminal plan, because, by definition, the criminal cannot account for them. Therefore, the particular choice of punishment should not produce significant ex-ante deterrence. Hence, the previously identified trade-off is tipped in favor of promoting marginal deterrence, and attempts that are abandoned due to unforeseeable and unanticipated developments ought to be punished less severely. This reasoning implies that we should punish Attempt 2 more severely than Attempt 3, if we believe that a true ‘change of heart’

\textsuperscript{13} See infra Parts III.A. and III.B. defining and explaining ex-ante deterrence in further detail.
\textsuperscript{14} By unforeseeable I mean an event that is not anticipated by the criminal.
is less foreseeable than an attempter finding out, for example, that there is an unusually strong police presence at the scene.

As pointed out in the existing literature, another important factor in the determination of the appropriate penalty reduction is the information that the abandonment reveals concerning the likelihood with which the attempter is likely to recidivate. Explaining this reasoning requires a brief description of one of the common rationales for punishing attempts in general, which relies on the supposition that attempting to commit a crime reveals that the attempter is dangerous, meaning that he is likely to recidivate. Based on this logic the claim is that attempters ought to be incapacitated to prevent future crimes. If this is true, then the expected incapacitative benefit from punishing an attempter is directly related to the strength of the information revealed regarding his dangerousness via his attempt. Ceteris paribus, intuitively a completed attempt signals, on average, a greater likelihood of dangerousness compared to an incomplete attempt. Similarly, a person, who abandons his attempt because his moral valuation of a criminal act has changed, is less likely to recidivate compared to a person who abandons his attempt only for strategic reasons. These observations supply further reasons as to why Attempts 1, 2, and 3 ought to be treated differently.

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15 See, e.g., Lee, supra note 9.
16 This is the main rationale extended and endorsed in the Model Penal Code. MODEL PENAL CODE COMMENTARIES, PART I § 5.01 comment 2, 303 (1985) (“The judgment is thus that if the defendant manifests a purpose to engage in the type of conduct or to cause the type of result that is forbidden by the criminal law, he has sufficiently exhibited his dangerousness to justify the imposition of criminal sanctions, so long as he otherwise acts with the kind of culpability that is sufficient for the completed offense.”). See also Hoeber, supra note 9, at 383 (classifying the theory “that attempt liability is justified [] because attempters are dangerous persons” as one of the “major theories of attempt liability.”).
17 Id. at 383-85 (explaining the Model Penal Code’s rationale for punishing attempts).
18 There is significant disagreement on whether this claim is true. Compare Id. at 383-85 (arguing that this claim is false, and concluding that “the dangerous-person rationale cannot justify the prohibition of attempts”), with Evan Tsen Lee, Cancelling Crime, 30 CONN. L. REV. 117, 152 (1997) (“Attempters who renounce are almost certainly less dangerous than attempters who go through with their target offenses, but are probably more dangerous than members of the public at large. Thus, the relatively moderate dangerousness of abandoning attempters provides a warrant for some reduced degree of incapacitation.”).
19 Id. at 152 (arguing a similar point); see also infra Part IV.B. discussing the strength of information revealed through attempts in further detail.
20 See infra Part IV.B. discussing the strength of information revealed through different abandonments in further detail.
The law in many jurisdictions approximate, to some degree, what I argue is the optimal punishment scheme for attempts, but they often do so indirectly and incompletely. Although “[t]he traditional common law view is that abandonment cannot be a defense to attempt,” currently there are at least two ways in which abandonment can play a role in the determination of an attempter’s liability. First, a person’s abandonment may signal that the person had previously not possessed or fully formed the requisite intent to commit the relevant crime. In this case, the mens rea element of the attempt would be lacking, and the alleged attempter would escape liability. Second, even in cases where the elements of attempt are present, in some jurisdictions, the defendant may have an abandonment defense or a renunciation defense. However, this defense is made available only if the defendant’s abandonment was ‘voluntary’ and under limited circumstances. If the defense is made available, on the other hand, the defendant is generally fully excused instead of being given mitigation in punishment.

21 Hoeber, supra note 9, at 377; see also Lee, supra note 9, at 119 (“common law of crimes did not recognize a renunciation defense.”).

22 LAFAVE, supra note 3, at 605–06; see also DRESSLER, supra note 3, at 411, n. 180 (“Even when abandonment is not recognized as a defense, however, a court may still find a defendant’s abandonment relevant in an attempt prosecution.”).

23 LAFAVE, supra note 3, at 605–06; People v. Kimball, 109 Mich. App. 273, 311 N.W.2d 343 (1981) (“[V]oluntary abandonment … may be relevant to the issue of whether defendant possessed the requisite intent in the first place”); see also DRESSLER, supra note 3, at 411, n. 180 (“For example, in Commonwealth v. McCloskey, 341 A.2d 500 (Pa. Super Ct. 1975), M, a prison inmate scaled the fence leading to the prison recreation yard, but he then returned because he did not want to shame his family by escaping… [H]is conviction [for attempted prison escape] was overturned on the questionable ground that M’s actions demonstrated that he was only contemplating an escape, but had not yet begun contemplating the act.”).

24 LAFAVE, supra note 3, at 605–06.

25 See, e.g., Lee, supra note 9, at 120 (“Since the promulgation of the MPC, twenty-six American jurisdictions have adopted an abandonment defense for attempt”); Hoeber, supra note 9, at 383 (“today approximately one half of American jurisdictions recognize the abandonment defense.”); LAFAVE, supra note 3, at 605–06; see also DRESSLER, supra note 3, at 411.

26 In some jurisdictions the defense is called the ‘Renunciation Defense’, see, e.g., TEX. PE. CODE ANN. § 15.04, or the ‘Defense of Renunciation’, see, e.g., Ky. REV. STAT. ANN. § 506.020, because renunciation of criminal intent is necessary for the defense.

27 See supra note 3.

28 See supra note 4.

29 But see TEX. PE. CODE ANN. § 15.04 (permitting mitigation in penalty where a defendant is convicted of a criminal attempt but can still successfully demonstrate during the penalty phase that he “renounced his criminal objective by abandoning his criminal conduct… before the criminal offense was committed and made substantial effort to prevent the commission of the object offense… [I]n the event of finding of renunciation under this subsection, the punishment shall be one grade lower than that provided for the offense committed.”).
Although the common legal approaches towards abandonment of attempts can be summarized as above, as Professor Wayne LaFave has stated, it is impossible to generalize about the current status of such a defense; one survey concluded that the issue remains an open question in most jurisdictions, and in some states the cases in point cannot be reconciled. Furthermore, “[e]ven when the rule has been adopted by the legislature, judges and lawyers sometimes seem to refuse to accept its existence and argue as if they do not understand it.” Given the lack of consensus among some of the most prominent legal scholars on the issue, it is perhaps unsurprising that there is confusion in the law on abandonments. This Article represents an attempt to formalize important factors that affect the normative desirability of potential laws on abandoned attempts with the hope of providing a coherent framework to discuss how the existing confusion in the law can be alleviated.

30 LaFave, supra note 3, at 607.
32 Citing and comparing People v. Staples, 6 Cal.App.3d 61, B5 Cal.Rptr. 589 (1970) (“it would seem that the character of the abandonment . . . is not controlling . . . . Once that attempt is found there can be no exculpatory abandonment.”) with People v. Von Hecht, 133 Cal.App.2d 25, 283 P.2d 764 (1955) (“Abandonment is a defense if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution and where there is no outside cause prompting such abandonment.”).
34 Compare, e.g., Lee supra note 9, at 118 (“I will ultimately conclude that there remains sufficient justification to punish even those who have completely and voluntarily renounced their criminal purpose in a timely fashion. . . . I argue that a renunciation should occasion some mitigation of punishment.”) and Yaffe, supra note 9, at 780 (“arguing] that [a person who attempts murder, and subsequently abandons his attempt] deserves mitigation in his sentence in light of his change of mind, but does not deserve an affirmative defense.”) with Hoeber, supra note 9 (“attempt liability should not be imposed on those who, having abandoned their efforts, did not try to commit crimes.”), Moriarty, supra note 4, at 2 (“I believe the defense deserves an extension beyond the boundaries presently assigned to it and argue for its expanded application.”), and Crew, supra note 9, at 411 (“arguing] that voluntary abandonment is a valid defense to liability for an attempted crime, and that only those attempters who have tried to the best of their ability to complete the intended crime, and have failed because of external circumstances, should be punished.”) See also supra note 6 listing previous law and economics articles analyzing attempts. Because the main focus of these articles is not abandonment of attempts, there is not significant tension between them in terms of what they suggest is the normatively desirable punishment for abandoned attempts. But see Ben-Shahar & Harel, supra note 6, at 334 (pointing out that the “Posner-Shavell…theory is not without its difficulties” and questioning the relevance of the marginal deterrence effect of punishing attempts less severely than completed crimes.).
This framework is constructed by using the law and economics methodology, and does not focus on retributive justice considerations. In particular, I focus on the deterrent and incapacitative effects of punishment, and demonstrate that penalty mitigations are likely to generate reductions in ex-ante deterrence and incapacitative benefits, but that they are likely to increase marginal deterrence and result in savings in enforcements costs. I consider how the trade-off between these benefits and costs are affected by the nature of the abandonment to identify relevant factors in the determination of the optimal penalty mitigation for abandonments.

This Article proceeds as follows. Part I provides a simple taxonomy of criminal conduct and criminal attempts, and thereby clarifies the precise subject of the Article. Part II formalizes how abandonment defenses can cause marginal deterrence. Part III introduces ex-ante deterrence, and identifies a trade-off between marginal deterrence and ex-ante deterrence caused by allowing mitigations in punishment for abandonment of attempts. In Part IV, I consider the incapacitative effect of imprisonment and identify two important factors affecting the normative desirability of penalty mitigations for abandonment of attempts. Part V compares the normative implications of my analysis with existing laws on abandonment, and offers a few conjectures that emerge from my analysis. Part VI concludes.

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35 This only implies that the scope of this article excludes retributivist considerations, and not that the normative implications described in Part V.A., infra, are necessarily inconsistent with those that would emerge from a retributivist analysis.

36 “The three basic measures of crime control most frequently discussed in the criminological literature are deterrence, incapacitation, and rehabilitation.” Isaac Ehrlich, On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence, 71 AM. ECON. REV. 307, 311 (1981). Like an overwhelming majority of economic analyses of criminal law, I do not comment on potential rehabilitative effects, mainly because, as noted in one of the most popular criminal law casebooks, “[i]ncarceration rarely is imposed today for rehabilitative (reform) purposes.” JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 36 (4th ed. 2007). See also Murat C. Mungan, The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation, 72 MD. L. REV. 156, 175-83 (2012) (describing the frequency with which deterrence, incapacitation, and rehabilitation are considered in law and economics analyses and reasons for why “[a]mong the three potential consequentialist justifications for punishment, rehabilitation receives the least attention” Id. at 176.)
I. A SIMPLE TAXONOMY OF ATTEMPTS

Distinguishing abandoned attempts from other criminal conduct is useful for clarifying the scope of the arguments presented in this Article. To start, it should be noted that the Article focuses on conduct committed by individuals, not crimes committed by organized groups, gangs, or other collections of individuals. Therefore, I proceed by providing a taxonomy of criminal attempts, as opposed to other inchoate crimes, such as solicitation and conspiracy. This taxonomy can be represented by figure 1, below, which is useful for walking the reader through the proposed categories of criminal conduct.

Figure 1: A Taxonomy of Attempts and other Criminal Conduct

37 For analyses focusing on other inchoate crimes, see Utset, supra note 6, and Michael Cassidy & Gregory Massing, The Model Penal Code’s Wrong Turn: Renunciation as a Defense to Criminal Conspiracy, 64 FLA. L. REV. 353 (2012).
38 Shavell, Punishment of Attempts, supra note 6 provides a similar taxonomy.
39 See Utset, supra note 6, and Moriarty, supra note 4 (listing inchoate crimes and other inchoate-like crimes).
As a starting point, one can distinguish between accomplished crimes and attempted crimes. Attempted crimes can be categorized further into two types: complete attempts and incomplete attempts.\(^{40}\) A complete attempt refers to a situation where the criminal has taken all necessary steps to accomplish his crime, but due to circumstances uncontrollable by him his actions have not produced the result that he had intended. A good example is found in *State v. Martin*,\(^ {41}\) where after robbing a family “[o]ne of the perpetrators instructed the other to kill [one of the victims], but when the other perpetrator pulled the trigger in compliance, the gun jammed. The perpetrators then fled from the scene.”\(^ {42}\) The court held that these facts were sufficient to support the defendant’s conviction for attempted second degree murder.\(^ {43}\)

An incomplete attempt, to the contrary, is one where the criminal has taken substantial steps, but not all steps that are necessary to complete his crime. If the person has not taken substantial steps to complete his crime, his acts do not constitute an attempt but “mere preparation.”\(^ {44}\) Incomplete attempts can be further broken down into two categories: interrupted attempts and abandoned attempts.\(^ {45}\) Interrupted attempts refer to situations where the criminal is prevented from taking further steps to complete his crime, and therefore never has a chance to complete it. For instance, a situation

\(^{40}\) Shavell, *Punishment of Attempts*, supra note 6 and Gervase, *supra* note 9 suggest a similar categorization. Shavell also symbolically formalizes the distinction between complete and incomplete offences as follows: “there are acts, designated by $A_1, A_2, \ldots$; states of nature, that is, possible circumstances, designated by $S_1, S_2, \ldots$; and outcomes, which in the context will either be $N$, meaning no harm, or $H$, meaning harm. Given an act $A$, the state of nature $S$ determines the outcome; that is, $f(A, S) = N$ or $H$, where the function $f$ describes whether harm occurs given the act and the state of nature. An incomplete attempt is an act $A$ such that $f(A, S) = N$ for all states of nature $S$; that is, harm does not occur under any circumstances because something necessary to the occurrence of harm was not done. A complete attempt is an act $A$ such that $f(A, S) = H$ for some state(s) of nature $S$; that is, the act $A$ will result in harm under some circumstances (perhaps many).” Shavell, *Punishment of Attempts*, supra note 6, at 446, n. 18.

\(^{41}\) 92 So. 3d 1027, 1029 (La. App. Cir. 1 2012).

\(^{42}\) Id. at 1030.

\(^{43}\) Id. at 1031.

\(^{44}\) See Dresler, *supra* note 3, at 380 (“The action must constitute a substantial step, beyond mere preparation, toward commission of the offense.”).

\(^{45}\) As a practical matter it may be difficult, in some cases, to distinguish between interrupted and abandoned attempts. See, e.g., LaFave, *supra* note 3, at 605 (discussing such difficulties in *People v. Staples*, 6 CAL.Rptr.3d 61, 85 CAL.RPTR. 589 (1970)); Shavell, *Optimal Use of Nonmonetary Sanctions*, supra note 6 at 1251 n. 76 (discussing potential issues related to error costs when it is difficult to distinguish between abandoned and interrupted attempts).
where “an individual is prevented from firing his gun by someone who grabs it away”\textsuperscript{46} may constitute an interrupted attempt.

Abandoned attempts, on the other hand, are situations where the criminal, despite having a chance to continue with his criminal plan, forgoes the opportunity to do so. A case exemplifying abandoned attempts is \textit{People v. Johnson}.\textsuperscript{47} This case involved a defendant, who, following a fight with a friend at a bar, went to his house to retrieve and load a gun and subsequently “crawled under a pickup truck across the street to wait for the friend.”\textsuperscript{48} After the truck’s owner approached, the defendant gave the driver some beer, took the keys to the truck, and made the driver sit in the vehicle while he remained underneath.\textsuperscript{49} However, after some time passed, the defendant began to sober up and reconsidered his plan to shoot his friend in retaliation for beating him up.\textsuperscript{50} By the time police arrived on the scene, the defendant had removed the shells from the firearm and placed them in his pocket.\textsuperscript{51} In this fact pattern, because the defendant’s attempt was “broken off by [him], not by the intercession of another,”\textsuperscript{52} his conduct constitutes an abandoned attempt.\textsuperscript{53}

This Article focuses mainly on abandoned attempts, and questions whether these attempts ought to be punished less severely than completed attempts. Although part IV.D. contains comments on the implications of my analysis concerning the proper punishment of interrupted attempts, a formal and complete analysis of interrupted attempts is beyond the scope of this Article.

\textsuperscript{46} Shavell, \textit{Punishment of Attempts, supra} note 6, at 446.
\textsuperscript{47} 750 P.2d 72 (Colo. App. 1987).
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Shavell, \textit{Punishment of Attempts, supra} note 6, at 446.
\textsuperscript{53} In \textit{People v. Johnson} the court had to determine whether “there was sufficient evidence to warrant an instruction on the affirmative defense of abandonment or renunciation”, and it determined that there was sufficient evidence. 750 P.2d 72 (Colo. App. 1987).
II. A Positive Analysis: The Marginal Deterrence Effect

A. Abandonments and Marginal Deterrence

The objective of marginal deterrence was accurately explained by more than two-hundred years ago by Bentham: “to induce a man to choose always the least mischievous of two offenses; therefore where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.”54 This objective was later called marginal deterrence in an influential 1970 article by George Stigler:55

If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder. If the thief has his hand cut off for taking five dollars, he had just as well take $5,000. Marginal costs are necessary to marginal deterrence.

As the excerpt from Stigler’s article demonstrates, what the term marginal deterrence was initially meant to capture was the diverting of criminal behavior towards the less harmful crime in cases where a criminal may choose to commit one among many crimes, and law and economics scholars have used the phrase to refer to this meaning.56

A similar type of deterrent effect can be found in the context of abandoned attempts versus other types of criminal conduct. If, despite having taken substantial steps to complete a crime, an offender is induced by the availability of a reduction in punishment for abandoned

54 JEREMY BENTHAM, An Introduction to the Principles of Morals and Legislation, in COLLECTED WORKS OF JEREMY BENTHAM 1, 168 (J.H. Burns & H. L. A. Hart eds., The Athalone Press 1970) (1789). As noted in Steven Shavell, A Note on Marginal Deterrence, 12 INT’L REV. L. & ECON. 345, 345 (1992), the concept of marginal deterrence was also described in the 18th century works of Beccaria and Montesquieu.
56 See, e.g., Shavell, supra note 54, at 345 (“a person may be contemplating which of several harmful acts to commit… In such contexts, the threat of sanctions plays a role in addition to the usual one of deterring individuals from committing harmful acts: it influences which harmful acts undeterred individuals choose to commit. Notably, undeterred individuals will have a reason to commit less rather than more harmful acts if expected sanctions rise with harm. This tendency is sometimes said to reflect marginal deterrence because an individual will be deterred from committing a more harmful act owing to the difference, or margin, between the expected sanction for it and for a less harmful act.”); David D. Friedman, Hanged for a Sheep – The Economics of Marginal Deterrence, 22 J. LEGAL STUD. 345 (1993) (defining marginal deterrence similarly).
attempts to abandon his criminal conduct, then that punishment scheme achieves a form of marginal deterrence.\textsuperscript{57} The label marginal deterrence is appropriate, because this punishment scheme does not deter the individual from taking substantial steps to commit the crime. Hence, the punishment scheme does not achieve ex-ante deterrence,\textsuperscript{58} but only a marginal form of deterrence. The possibility of achieving this type of deterrence through less severe punishments for attempts has previously been noted by Richard Posner, who has also characterized it as a form of marginal deterrence. Posner notes that one of the rationales for punishing attempts less severely than results is “to give offenders an incentive to change their minds at the last moment (a form of marginal deterrence)”\textsuperscript{59}

To discuss marginal deterrence effects, in the proceeding parts of this Article, I use the phrase ‘Defense’ to refer to any defense or mitigating factor that the defendant is entitled to upon a showing of abandonment.\textsuperscript{60}

B. The (Un)importance of Criminals ‘Changing their Minds’

In an article analyzing the punishment of attempts,\textsuperscript{61} Omri Ben-Shahar and Alon Harel question the relevance and importance of the marginal deterrence rationale proposed by Posner.\textsuperscript{62} Specifically, they state:\textsuperscript{63}

[Posner’s] marginal deterrence application justifies the lenient treatment of attempts as providing

\textsuperscript{57} See infra note 59 and accompanying text.
\textsuperscript{58} See text accompanying supra note 13, and parts III.A. and III.B. infra for definitions and explanations of ex-ante deterrence.
\textsuperscript{59} Posner, supra note 6, at 1217-18. Professor Shavell also notes a potential marginal deterrence effect, but notes that Posner’s point does not provide a justification for punishing attempts in general less severely than accomplished crimes because “[t]he argument does not recognize that different sanctions may be imposed for different types of attempts.” Shavell, Punishment of Attempts, supra note 6, at 455.
\textsuperscript{60} One may question whether the usage of the word ‘defense’ is proper to refer to mitigating factors. This appears to be a simple semantic point. Nevertheless, it can be addressed easily by defining abandoned attempts and completed attempts as separate offenses, and by making abandonment a complete defense against a completed attempt charge. Similar categorizations and defenses exist in the law. Lack of malice aforethought, for instance, provides a complete defense against a murder charge.
\textsuperscript{61} Ben-Shahar & Harel, supra note 6.
\textsuperscript{62} Posner, supra note 6, at 1217-18.
\textsuperscript{63} Ben-Shahar & Harel, supra note 6, at 334 (emphasis added).
incentives for rational criminals to "change their minds" and abandon a plan that they have already begun to pursue. One may wonder why rational individuals would even begin the pursuit of a crime if they expect to change their minds in the process. If the incremental sanction imposed on completed acts is sufficient to generate marginal deterrence, why does it not generate full deterrence and prevent the initiation of pre-crime activities? After all, a criminal who commits an attempt intends it to succeed, and takes into account the sanction for completed acts. If that does not deter him, why would the same sanction deter him when he has already initiated the act and has only to decide whether to finalize it? Unless the criminal learns new information that leads him to reevaluate the desirability of completing the crime, there is no reason to expect marginal deterrence to operate upon him.

Professors Ben-Shahar and Harel are certainly correct in their conclusion, but the conclusion is a conditional one, one that relies on criminals not obtaining new information.64 There, could, however, be many instances in which criminals obtain new information during the course of criminal undertakings.65

Consider, for instance, a potential offender who is planning to rob a gas station. Ex-ante, he has some estimate of the likelihood of being caught during the robbery.66 He may know, for instance, that there is,
on average, a single security guard at the particular gas station. However, he is also aware that this is only the average number of security guards: sometimes there are two, and sometimes there are no security guards present at the gas station. Therefore, it is reasonable to assume that the potential criminal can re-evaluate (implicitly or explicitly) the likelihood of being caught upon arrival at the gas station, since he can observe how many security guards are present, how many cameras are installed, whether there are police officers patrolling the neighborhood, and so on. Moreover, external factors need not be the only source of new information. A criminal may re-evaluate his benefits from crime, correct his optimism upon confronting danger, and rid himself of his false expectations regarding his preferences.

Given that criminals may acquire more information (from external as well as internal factors) after taking several steps to complete a crime, there are reasons to expect marginal deterrence to operate on them. In particular, the Defense can give people an incentive to abandon criminal activity upon discovering new information. In the next section, I formalize this idea by using a simple decision tree.

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67 See Ben-Shahar, supra note 6, at 548; Kramer, supra note 6, at 401 (noting similar points).
69 See Mungan, supra note 36, at 202, n. 168 (reviewing previous literature on optimism and overconfidence: "Christine Jolls, On Law Enforcement with Boundedly Rational Actors, in THE LAW AND ECONOMICS OF IRATIONAL BEHAVIOR 273 (Francesco Parisi & Vernon Smith eds., 2004) ("[A] highly robust feature of human behavior is that people underestimate the probability that negative events will happen to them as opposed to others"); see also Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051, 1091–93 (2000) (discussing issues related to overconfidence and optimism biases); Neil D. Weinstein, Unrealistic Optimism About Future Life Events, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980); Neil D. Weinstein, Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample, 10 J. BEHAV. MED. 481 (1987)."
70 See Utset, supra note 6, at 1207 ("There is a large empirical literature finding that people routinely mispredict the extent to which their preferences may change over time. This is due to a projection bias: When trying to predict their future tastes and preferences, people will give undue weight to their current tastes and preferences."). On projection-bias generally, see George Loewenstein et al., Projection Bias in Predicting Future Utility, 118 QUARTERLY J. ECON. 1209 (2003).
C. Formalizing the Marginal Deterrence Effect

To illustrate how the Defense may cause marginal deterrence, consider a modified version of Alyona Ivanovna’s murder by Raskolnikov, a character from Dostoevsky’s novel *Crime and Punishment*.\(^1\) In this hypothetical Raskolnikov arrives at Alyona’s apartment with an axe concealed under his coat.\(^2\) His intention is to kill Alyona with the axe to steal some valuable items from her. He knocks on Alyona’s door and forces his way into her apartment.\(^3\) Once he’s in the apartment, he takes the axe out of his coat,\(^4\) and right before he is about to swing it towards Alyona, and unlike in *Crime and Punishment*, he sees Alyona’s sister, Lizaveta, walk into the room. Raskolnikov suspects that neither Lizaveta, nor Alyona has yet seen his axe. Raskolnikov appears to have two choices: (i) put the axe back in his coat, hope that the two women have not seen it, and leave Alyona’s apartment, and (ii) kill both women and proceed with the initial plan.

While thinking about how to proceed, Raskolnikov realizes that what would otherwise be an easy crime is now complicated by the arrival of Lizaveta. Ex-ante, Raskolnikov was hoping for a situation where he would catch Alyona alone in her apartment, and kill her very quickly, before she could utter a single word, which would make his escape very easy, and therefore his detection and subsequent conviction very unlikely. Lizaveta’s presence jeopardizes Raskolnikov’s escape plan, as she is very likely to scream and alert others.

What does Raskolnikov do, abandon his crime, or continue with it? Assuming he’s rationally weighing his options,\(^5\) his decision depends, in part, on whether abandoned attempts are punished as severely as completed attempts. The following game tree can be used to formalize

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\(^2\) Id. at 75-76.

\(^3\) Id. at 75.

\(^4\) Id. at 76.

\(^5\) In *Crime and Punishment*, supra note 71, there are many statements suggesting that Raskolnikov is not fully aware of himself. *See, e.g.*, id. at 76 (“He took the axe all the way out, swung it with both hands, scarcely aware of himself, and almost without effort, almost mechanically, brought the butt-end down on [Alyona’s] head.”).
how Raskolnikov’s decision making process is affected by the presence or absence of the Defense:

**Figure 2: Raskolnikov’s Decision Tree**

If Raskolnikov continues, he expects, given Lizaveta’s arrival, that he will be caught with a probability of 1/3. In this case, he expects to be exiled to Siberia, which he equates to a loss of $120,000. If, however, he is not caught—which happens with a probability of 2/3—he expects to steal about $30,000 worth of valuable items from Alyona. According to these numbers, his expected return from continuing with the robbery is: $1/3 \times (-$120,000) + 2/3 \times ($30,000) = -$20,000.

On the other hand, if Raskolnikov abandons his crime, he estimates that he will be caught with a probability of 1/5, in which case his fate will depend on whether or not the Defense is available, and whether it is applicable to his case. In particular, if the Defense is not available, assume briefly that Raskolnikov will be found guilty for attempted murder and that this is punished as severely as murder. In this case,

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26 This is what ends up happening to Raskolnikov in Crime and Punishment supra note 71.
27 This assumption is mainly simplifying, and the effects of relaxing it are discussed in the next paragraph.
Raskolnikov’s expected return from abandoning is: \( \frac{1}{5} \times (-$120,000) + \frac{4}{5} \times ($0) = -$24,000 \). On the other hand, if the Defense is available, and it operates as a complete defense, Raskolnikov’s expected return from abandoning is $0. Comparing these two numbers to Raskolnikov’s expected return from continuing with the robbery implies that Raskolnikov will be deterred from continuing with his plan only when the Defense is available. This type of deterrence effect, which is not produced when Raskolnikov is punished even when he abandons his conduct, is the marginal deterrence effect of the Defense.

Of course, this is a single and simple example, which abstracts from some relevant issues. One may ask for instance, what would have happened if the punishment for abandoned attempts was intermediate, that is, between $0 and $120,000. It is easy to verify that marginal deterrence would be achieved, holding everything else constant, if the punishment for Raskolnikov’s abandoned attempt was the equivalent of less than $100,000. Hence, a complete defense is sufficient but not necessary, in this example, to generate marginal deterrence. On the other hand, other considerations, such as ex-ante deterrence, may make partial sentence reductions more appealing than complete defenses. In order to discuss this, and other issues, a more elaborate analysis is necessary, which requires addressing points raised by scholars in previous analyses.

As pointed out by professors Ben-Shahar and Harel,\(^{78}\) it is unclear whether and why sanctions sufficient to deter Raskolnikov from continuing with his plan are insufficient to deter Raskolnikov from going to Alyona’s apartment with the intent to murder her in the first place. After all, his expected return is at most $0 in the game tree represented by figure 2. So why then, would Raskolnikov want to rob Alyona’s apartment in the first place? The reason for this may be that, absent new information, Raskolnikov believes that it is highly likely for Alyona to be alone at home. Therefore, ex-ante, his pay-off from initiating his criminal plan might be positive, despite the non-positive return in the state of the world where Alyona is not alone. As such, his ex-ante expected pay-off from initiating the criminal plan can be positive. In this case, he would be undeterred from initiating the plan,

\(^{78}\) Supra note 6.
but deterred ex-post from continuing when Lizaveta is present. Because this claim appears to be intuitive, its proof is relegated to part IV, where a larger decision-tree is used to analyze the effect of the Defense.

This insight immediately leads to the next important question. The Defense reduces the cost to Raskolnikov in the state of the world where Alyona is not alone from -$20,000 to $0. Might this reduction in cost not cause Raskolnikov to initiate a criminal plan that he otherwise would not have? In other words, might the Defense not be causing a reduction in ex-ante deterrence for purposes of increasing marginal deterrence? If that is the case, would it not be wiser to not have the Defense, since marginal deterrence, that is, inducing Raskolnikov to abandon his crime, would never be necessary if Raskolnikov never initiated a criminal plan?

Answering these and similar questions requires incorporating ‘changes in circumstances’ into the economic analysis of attempts. Once this is done, one can focus on the trade-off between marginal and ex-ante deterrence and demonstrate that the marginal deterrence effect can off-set the ex-ante deterrence effect. Furthermore, once the benchmark model of deterrence and rational decision making is structured, one can consider the effects of other considerations including behavioral deviations from rationality and the incapacitative effect of imprisonment.

III. THE TRADE-OFF BETWEEN MARGINAL DETERRENCE AND EX-ANTE DETERRENCE

A. Incorporating ‘Changes in Circumstances’ into the Economic Analysis of Attempts

Existing formal economics models of attempts mainly focus on whether attempts in general ought to be punished less severely than results.79 These models do not incorporate the possibility of offenders acquiring new information between the time the potential offender

79 See supra notes 6-8 and accompanying text.
triggers potential liability for attempts and the time when he is in a position to take the last step necessary to complete his crime.\(^8^0\) When the incorporation of such information is possible, one can talk about potential changes in circumstances.

A rational potential offender, while contemplating a criminal act, considers how things are likely to develop. If the ex-ante expected return associated with the criminal act is positive, he initiates the criminal plan. However, between the time he initiates his plan, and the time the final step necessary to complete the crime must be taken, circumstances may change. Circumstances may appear to be ‘out of the ordinary’, and the potential offender may use this new information to re-calculate his expected returns from completing the offense. In other words, the expected return associated with the crime may deviate significantly from what the criminal had initially anticipated. If the expected return is higher than what the criminal had initially anticipated, he will continue with the crime. If, however, the expected return deviates significantly and negatively from the return the criminal had initially calculated, the criminal must re-evaluate his decision. If abandoned attempts are punished less severely, then, as explained in the previous part, the potential criminal may be induced to abandon his criminal plan.

To incorporate this idea, existing economic models of criminal decision making\(^8^1\) must be modified to allow for multiple states of the world, each generating a different expected return associated with continuing with crime. The simplest way to incorporate this change is by assuming that the criminal act involves three periods. In Period 1 the potential criminal decides whether or not to initiate a criminal

\(^8^0\) See, e.g., the modeling in Shavell, *Punishment of Attempts*, supra note 6, where the temporal dimension of the criminal act is not considered, and therefore there is no room for the criminal to incorporate new information (“An individual may commit a potentially harmful act from which he will obtain a benefit. If he commits such an act, harm will occur with some probability \(q\), and harm will not occur with the complementary probability \(1—q\). In the latter case, we will say that the individual committed only an attempt.”). Shavell, *Punishment of Attempts*, supra note 6, at 438. As professor Shavell later notes, the temporal dimension of criminal acts has been noted in the 18\(^{th}\) century by Beccaria. See, CESARE BONIARI BeCCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS ch. 37 (1st ed. 1767) (“as there may be an interval of time between the attempt and the execution...”). That offenders may incorporate new information within this ‘interval of time’ has later been noted by modern scholars: see supra notes 64 and 65.

\(^8^1\) See Polinsky & Shavell, supra note 66 (describing public law enforcement models commonly used to analyze criminal decision making a la Becker, supra note 66).
plan, that is, whether or not to begin his criminal activity. If he goes ahead with the criminal act, in Period 2, new information is revealed to the criminal; he finds out whether circumstances are beneficial or detrimental to his criminal plan. Given this new information, the criminal decides whether to abandon the criminal act or to continue with it. In Period 3 he is either convicted and punished or evades detection in which case he avoids punishment. If he continues with the crime, he risks being caught for the completed offense or for a non-abandoned criminal attempt. But, he may also evade detection and benefit from his crime. If, on the other hand, he abandons his crime, then he forgoes the possibility of acquiring criminal benefits, and risks being punished for an abandoned criminal attempt. This model is conveniently summarized by the following decision tree:

**Figure 3: Potential Offenders' Decision Tree**

![Decision Tree Diagram]

- **Period 1**: Begin Criminal Activity or Do Not Begin Criminal Activity
- **Period 2**: Good State or Bad State
- **Period 3**: Continue vs. Crime or Abandon Criminal Conduct
- **Pay-off**: Conviction & Punishment, Not Punished, Benefit from Crime, No Benefit from Crime
In figure 3 $\pi_g$ and $\pi_b$ represent the expected pay-offs associated with continuing with the crime. The variation between $\pi_g$ and $\pi_b$ can be caused by many factors, including differences in the probability of detection or conviction, differences in criminal benefits to be earned from completion of the crime, and differences in the cost of completing the crime. The precise source of variation may be crucial for purposes of identifying optimal punishment schemes, especially when some ‘bad states’ are not foreseeable by the criminal. But, for the current purpose of building a benchmark model identifying deterrence effects it is sufficient to note the mere existence of such variations. In Part IV, imperfect expectations are considered, and sources of potential variations are discussed in greater detail.

B. Abandonment and Ex-Ante Deterrence

I have previously noted that imposing reduced penalties for abandoned criminal attempts may cause a reduction in ex-ante deterrence. Figure 3 can be used to clearly demonstrate this effect. In particular, if marginal deterrence is to be achieved through such reductions, it must be true that the potential offender is induced to abandon his criminal act in period 3 due to the existence of such a reduction. If this is the case, then the potential offender’s expected payoff in the ‘bad state’ must be increased from $\pi_b$ to $-s_r$ by virtue of the penalty reduction. This naturally raises the ex-ante expected payoff to the criminal by the difference between these two pay-offs (i.e. $-s_r-\pi_b$), discounted by the probability (i.e. $1-\lambda$) with which the criminal will end up in the ‘bad state’: $(1-\lambda)(-s_r-\pi_b)$.

This implies that there could be circumstances in which, but for the reduction in penalty for the abandoned attempt, the potential criminal could have been deterred from crime ex-ante. To see this, note that absent the marginal deterrence effect of reduced penalties for abandoned attempts, the criminal’s pay-off is given by $(1-\lambda)\pi_b + \lambda\pi_g$. If this number is negative but close to zero, say -$10$, it could be the case that the additional reduction in expected penalties from the criminal

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Note that the marginal deterrence effect cannot be observed in the good state, because the criminal is getting a positive pay-off, otherwise he would not contemplate crime in the first place. This implies that marginal deterrence cannot exist unless the offender is rewarded for abandoning his crime through subsidies.
due to reductions in penalties for abandoned attempts (i.e. \((1-\lambda)(s_r-p_b)\)), is sufficient to induce the potential offender to commit crime. In fact, as long as \((1-\lambda)(s_r-p_b) > 10\), the Defense will induce the criminal to initiate a criminal plan that he would otherwise not. This naturally raises the following question: assuming rational decision making, can the Defense, if allowed for abandoning of crimes, reduce crime?

C. A Normative Result: Penalty Reductions for Voluntary Abandonment Can Reduce Crime

Next, I present a very simple example to affirmatively answer the aforementioned question. Consider the decision tree illustrated in figure 3, and suppose that

\[
p_g = 3000; p_b = -300; \lambda = 40%; q_h = 5% \tag{1}
\]

To determine how the availability of a Defense for abandoning of crimes affects the potential criminal’s decisions, the decision-tree represented in figure 3 can be solved by backward induction.\(^83\) Given the values in line (1), it is clear that the potential criminal will choose to continue with the crime whenever he is in the ‘good state’, regardless of whether or not the Defense is available. This follows, because continuing results in a positive expected pay-off, whereas abandoning results at most in a pay-off of $0. On the other hand, whether or not the criminal abandons the crime in the ‘bad state’ depends on the value of \(s_r\), which reflects the potential penalty reduction for abandoned crimes. In particular, if \(-q_h s_r\) (the expected return from abandoning the crime) is greater than \(p_b\) (the expected return from continuing with the crime) the criminal will abandon the crime, otherwise he will not. Plugging in the numbers from line (1) reveals that this condition is met when \(s_r < 6000\).

\(^83\) Backward induction is the most commonly used method for determining the equilibria of sequential games. See, e.g., Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 6 (1996) (“In analyzing this case, as well as subsequent cases, we are going to apply ‘backward induction.’ This approach is the standard method used by economists for analyzing strategic interactions in which parties make decisions over several time periods.”). See also Robert Gibbons, *Game Theory for Applied Economists* 57-61 (1992) (explaining how to use backward induction).
First consider the case where the Defense is not available, so that $s_r > $6,000. In this case, the potential criminal’s expected pay-off from initiating the crime in the first place is:

\[ \lambda \pi_g + (1 - \lambda)\pi_b \]  

(2)

plugging in the values from (1), reveals that this corresponds to $(0.4 \times $3000) + (0.6 \times (-$300)) = $1020. Since this number exceeds the value attached to the outside option of not committing crime, the potential criminal decides to initiate the criminal plan. This observation reveals that when the Defense is not available the criminal initiates his plan, and executes it in both states of the world (i.e. the good as well as the bad state).

Next, consider the case where the Defense is available, such that $s_r < $6,000. The potential criminal’s expected benefit from initiating the criminal plan is given by:

\[ \lambda \pi_g + (1 - \lambda)(-q_h s_r) \]  

(3)

This is because the potential criminal knows that if things go bad, he will abandon his plan, in which case he will only face the risk of receiving the smaller sanction for abandoned attempts, namely $s_r$, which happens with a probability of $q_h$. If, on the other hand he ends up in the good state, he will complete the crime, which results in an expected pay-off of $\pi_g$. This implies that the potential criminal’s expected return from initiating his plan must be greater than the corresponding expected return when there is no Defense, namely $\$1020$.

This brief analysis reveals that when the Defense is available, the criminal initiates his plan, but does not execute it 60% of the time, because 60% is the probability with which the criminal enters the ‘bad state’ and abandons the crime. Hence, allowing the Defense for strategic abandoning of crimes lowers the probability of the crime being pursued to completion by 60%. This is the equivalent to a 60% reduction in the crime rate,$^84$ assuming that there is a continuum of

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$^84$ This result focuses on the instantaneous effect on deterrence and abstracts from incapacitation effects. If offenders are not imprisoned for abandoned attempts, a proportion of them may later try to commit crime again. See Part IV.B. infra discussing incapacitation and potential recidivism,
offenders who have characteristics and face criminal opportunities of the type described in line (1).

Although this example abstracts from many relevant issues, it highlights an important function of the Defense: the marginal deterrence effect of the Defense lowers the rate of completed crimes committed by potential offenders whom it would be difficult or impossible to deter ex-ante through harsh penalties. Accordingly, the deterrent effect of the Defense is positively related (i) to the number of crimes whose initiation cannot be deterred ex-ante through harsh penalties, but whose completion can be deterred ex-post, and (ii) to the probability with which the potential criminal enters the ‘bad state’.

D. The Trade-Off between Marginal Deterrence and Ex-Ante Deterrence

The preceding example and its brief analysis reveal important characteristics of the potential gains from allowing a Defense. It does not, however, tell us anything regarding the costs of allowing the Defense for abandoned attempts. This is because the preceding example considers a situation in which the potential criminal is one whose decision to initiate the criminal plan is independent of whether or not the Defense is available. If the Defense was applied only in these circumstances, then it would unambiguously reduce crime rates. However, there may be variation among criminals which is not captured by the previous example. In particular, as discussed briefly in Part III.B., there can be criminals whose expected returns from committing crime are low enough for them to be deterred by harsh penalties. The existence of potential offenders of this type might generate costs associated with the Defense in the form of reduced ex-ante deterrence.

To make this point more discrete and to illustrate the trade-off between marginal and ex-ante deterrence, consider two groups of individuals. The first group of potential offenders (Type C) are those who were considered in Part III.C. Type C people cannot be deterred

and in particular see infra note 106 noting that the proportion of re-attempters depends, among other things, on the proportion of attempters encountering criminal opportunities in the future.
from initiating the criminal plan through the use of harsh penalties,\textsuperscript{85} but can be induced to abandon their criminal plans in 'bad states', if there is a significant reduction in the penalty for abandoned attempts. The second type of potential offenders (Type D) are those who were considered in Part III.B. Type D individuals can be deterred from even initiating a criminal plan, but only if there are harsh penalties for abandoned attempts.

Given the characteristics of Type C and Type D individuals, an important trade-off emerges between (i) reducing the execution of crimes committed by Type C individuals by allowing the Defense, and (ii) reducing the initiation of criminal plans by Type D individuals by not allowing a Defense. This trade-off implies that the optimality of allowing the Defense hinges on\textsuperscript{86} (1) the ratio of Type C to Type D individuals, and (2) the frequency with which individuals enter 'bad states' in which they abandon their attempts.

In reality there are of course not two types of potential offenders, but a much larger number of types. When a larger number of types are present it matters not only whether the Defense is available, but also the specific reduction in the penalty for abandoned attempts. In particular, the greater reduction in the penalty will cause greater marginal deterrence effects, but at the cost of lower ex-ante deterrence. To see this consider four groups of individuals, (i) Type 1: those who require a reduction of more than X in the penalty to abandon their crimes in 'bad states', (ii) Type 2: those who require a reduction of X+1 in the penalty to abandon their crimes in 'bad states', (iii) Type 3: those

\textsuperscript{85} Harsh penalties refer to the maximal penalty available for a particular offense. One may question why, theoretically, a maximal penalty may exist for a particular offense. There are, at least two reasons for this. The first reason is related to marginal deterrence, used in its primary meaning, which is, as defined in Part II.A. supra, the diverting of criminal behavior towards the less harmful crime in cases where a criminal may choose to commit one among many crimes. “Considerations of marginal deterrence... imply that the schedule of sanctions rises with the magnitude of harm. Overall, this acts as a limitation on the size of sanctions.” Shavell, \textit{Punishment of Attempts}, supra note 6, at 449. Professor Shavell notes a second constraint on the size of sanctions: “society may desire that there be some proportionality maintained between the gravity of bad acts and the severity of punishment for them. If so, the size of sanctions for doing harm is limited by the proportionally fair magnitude.” \textit{Id}.

\textsuperscript{86} Theoretically, the initiation of the plan may cause social harms in addition to the execution of the criminal plan. If that is the case, the ratio between these harms and the harms from the completion of the crime will also affect the optimality of making an abandonment defense available: the greater the ratio, the more important is ex-ante deterrence, and therefore the more smaller is the optimal mitigation in punishment.
who are deterred from initiating a criminal plan only if the reduction for abandoned attempts is less than X, (iv) Type 4: initiating a criminal plan only if the reduction for abandoned attempts is less than X+1.

The following table represents the effect of various penalty reductions on these individuals’ criminal behavior:

<table>
<thead>
<tr>
<th>Penalty reduction (R)</th>
<th>Type 1</th>
<th>Type 2</th>
<th>Type 3</th>
<th>Type 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>R&lt;X</td>
<td>Not marginally deterred</td>
<td>Not marginally deterred</td>
<td>Deterred ex-ante</td>
<td>Deterred ex-ante</td>
</tr>
<tr>
<td>X&lt;R&lt;X+1</td>
<td>Marginally deterred</td>
<td>Not marginally deterred</td>
<td>Deterred ex-ante</td>
<td>Not deterred ex-ante</td>
</tr>
<tr>
<td>R&lt;X+1</td>
<td>Marginally deterred</td>
<td>Marginally deterred</td>
<td>Not deterred ex-ante</td>
<td>Not deterred ex-ante</td>
</tr>
</tbody>
</table>

This example with four types of individuals demonstrates the incremental effect of reducing the penalty for abandoned attempts. Given this observation, in theory, one must talk not only about the optimality of having a Defense, but also the optimal reduction in the penalty for abandoned attempts. As the examples demonstrate, increasing the reduction in penalty increases marginal deterrence, but at the cost of a reduction in ex-ante deterrence. Therefore, assuming these costs and benefits behave according to standard economic assumptions, the optimal reduction in penalty will be there where the incremental benefit from marginal deterrence equals the incremental cost from ex-ante deterrence.\(^87\) These incremental benefits and costs, on the other hand, will depend on the relative size of each group (i.e. Types 1-4) and the frequency with which Types 1 and 2 enter ‘bad states’.

\(^87\) If incremental benefits always exceed incremental costs, then abandonment ought to operate as a complete defense. Conversely, if incremental costs always exceed the incremental benefit, then it is optimal to not have any reduction in the penalty for abandoned attempts. One can call these ‘corner solutions’.
In plain English, what this means is that whether and to what extent a Defense should be available for abandoned attempts depends on the number of attempts we expect to be abandoned as a result of the availability of the defense, and our belief concerning the number of individuals who would be induced to commit crimes because they get an easy way out of being punished when the Defense is available. Further sophisticated and lengthy analysis is required to gather information on these numbers, and, presumably, the answers to these questions will depend on the type of crime. The objective here is not to supply specific numbers, but to provide a list of factors that affect the social value of providing sentence reductions for strategically abandoned crimes. In line with this objective, in the next part I consider the potential effects of considerations that the benchmark model presented in this Part abstracts from.

IV. FACTORS AFFECTING THE NORMATIVE DESIRABILITY OF PENALTY REDUCTIONS FOR ABANDONMENTS

A. Unforeseeability of Events Leading to Abandonment

An overwhelming majority of economic analyses of criminal behavior assume that individuals have constant criminal tendencies.\textsuperscript{88} In other words the standard “model assumes that people consistently make the same choices over illegal and legal options. They do not, for instance, park legally today and park illegally tomorrow, unless the expected fine for illegal parking changes over time.”\textsuperscript{89} An alternative and more realistic assumption is that potential offenders possess “fluctuating criminal tendencies”.\textsuperscript{90} That is, a potential offender may decide to engage in a criminal act today, but forgo the opportunity to engage in a virtually identical act (that is, an act associated with the same expected return) at some point in the future. One can think of at

\textsuperscript{88} See Mungan, \textit{supra} note 36, at 184-87 (explaining how most economic analyses of criminal law assume constant criminal tendencies).

\textsuperscript{89} \textit{Id.} at 166.

\textsuperscript{90} \textit{Id.} at 194-205 (defining fluctuating criminal tendencies and proposing methods to incorporate offenders with such tendencies into standard crime and deterrence models).
least two reasons for this type of fluctuation: “First, people may have different benefits from the same illegal activity at different points in time.” And, second, the degree of self-control people possess may vary throughout time and circumstances.

Regardless of their specific sources, if fluctuations in criminal tendencies are unforeseeable ex-ante, then they are likely to generate asymmetric effects on marginal deterrence versus ex-ante deterrence. The Defense will induce the criminal to abandon his attempt when he, during the course of his criminal conduct, possesses a lower than previously anticipated criminal tendency, and this will result in additional benefits due to marginal deterrence. But, a similar ex-ante deterrence effect should not be observed, because while initiating his criminal plans the potential offender does not expect to experience fluctuations in his criminal tendencies in the future. Other scholars have noted this before, suggesting that abandonment defenses requiring a complete and voluntary renunciation are unlikely to “embolden those considering some criminal endeavor because they will be more willing to take the first steps toward the crime when they know they can withdraw with impunity.”

This brief analysis implicitly assumes that a person who experiences a negative shock to his criminal tendency requires an incentive to abandon his criminal conduct. This is not true in situations where the person’s criminal benefit fluctuates to negative values, meaning that the person is willing to forgo all criminal benefits in order to avoid committing the criminal act. In these situations, even if

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91 Id. at 194. A third and related source of fluctuation in criminal tendencies may relate the criminals’ biased perception of expected costs and/or benefits. In particular, a criminal possessing optimism bias will over-estimate the expected net benefit associated with crime. Id. at 202. Furthermore, people may suffer from projection-bias, which refers to “[p]eople exaggerate[ing] the degree to which their future tastes will resemble their current tastes” George Loewenstein et al., supra note 70, at 1209. A combination of optimism bias and projection bias may be effective in explaining why people experience changes of hearts before taking the last steps towards committing crime. An optimistic person may discount his likelihood of panicking, having moral concerns, and similar feelings. When the time comes to commit the crime, he may indeed experience these feelings and decide to abandon his crime.

92 Mungan, supra note 36, at 194.

93 Id. at 194.

94 This follows because the number of instances where the offender enters a ‘bad state’ increases, and these are exactly the instances in which marginal deterrence is likely to be effective. See Part III.D. supra.

95 See LaFave supra note 3, at 609.

96 Id.
the punishments for abandoned attempts and results are equal, the person would be inclined to abandon his conduct. This suggests that the Defense does not have a marginal deterrence effect, because the person is ‘marginally deterred’ even without the Defense. But, it also suggests that the offender need not be punished to abandon his crime. Given that punishment is costly, it is economically wasteful to devote resources to punishing this person. Therefore, the Defense, in these situations, does not have a marginal deterrence effect, but leads to benefits in the form of savings in punishment costs.

The preceding comments reveal that providing the Defense in cases where the crime is abandoned due to unforeseeable fluctuations in criminal tendencies leads to benefits from marginal deterrence as well as savings in punishment costs. This implies that the Defense is likely to have greater marginal benefits, ceteris paribus, when ‘changes in circumstances’ are caused by unforeseeable fluctuations. Therefore, it is optimal to provide greater mitigations in punishment for abandonments caused by this type of fluctuations. The law’s distinct treatment of voluntary versus involuntary abandonments can be interpreted as an effort to achieve such separation. But, as I argue in Part V, social welfare would be increased if the law focused less on creating rigid categories of attempts to define which attempters are fully excused, and more on factors that should go into determining the proper sentence reduction for abandonments.

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97 This is also true for some individuals when, as in figure 2, the probability of conviction is lower for abandoned attempts than for completed attempts. The difference in the probability of conviction may be sufficient to induce some individuals to abandon their crimes. These individuals, too, do not require penalty reductions to abandon their crimes.


99 Similar benefits are realized from the mitigated punishment of individuals as described in supra note 97 and 98 and accompanying text.

100 See Part V.A. infra for a review existing laws on abandonment.
B. Revealed Information on Offender’s Dangerousness

The preceding parts, like the majority of economic analyses of criminal law, focus on deterrence as the main goal of criminal law.\(^{101}\) However, an often neglected function of imprisonment is incapacitating dangerous offenders.\(^{102}\) One may argue that once incapacitative benefits from imprisonment are accounted for it may be optimal for there not be an abandonment defense, because by initiating the crime the offender has revealed his dangerousness,\(^{103}\) and by letting him go free the criminal justice system fails to take advantage of an opportunity to prevent recidivism.\(^{104}\)

This argument against the Defense has a few important weaknesses.\(^{105}\) First, abandonment may signal, albeit in a noisy way, that the criminal has initiated a criminal plan due to mistaken beliefs or irrational behavior, in which case his initiation of the crime signals less concerning the likelihood with which he will recidivate.\(^{106}\) In this

\(^{101}\) See Mungan, supra note 36, at 175-81 (reviewing existing literature and concluding that (economic theories of crime and law enforcement focus predominantly on deterrence and pay very little attention to rehabilitation and incapacitation” (footnotes omitted)) Id. at 175.

\(^{102}\) Id. at 177-79 (reviewing existing literature and concluding that “[n]ormative L&E analyses of law enforcement that incorporate incapacitation as a justification for punishment are rare.”) Id. at 177.

\(^{103}\) See supra note 16 and accompanying text.

\(^{104}\) See supra note 17 and accompanying text.

\(^{105}\) Hoenber, supra note 9, argues that the “dangerous-person” rationale cannot justify the prohibition of attempts. Hoenber, supra note 9, at 384-85. In this Part, I consider not whether this rationale can supply a justification for attempt liability, but how, assuming attempt liability is desirable for purposes of achieving deterrence (as is argued in the previous law and economics literature, see, e.g., Shavell, Punishment of Attempts, supra note 6), social welfare can be increased by making use of noisy signals regarding attempters’ dangerousness. A similar approach is taken in Lee, supra note 9 (“Attempters who renounce are almost certainly less dangerous than attempters who go through with their target offenses, but are probably more dangerous than members of the public at large. Thus, the relatively moderate dangerousness of abandoning attempters provides a warrant for some reduced degree of incapacitation.”) Id. at 152.

\(^{106}\) A related weakness in the argument is that it relies on the attempter encountering similar criminal opportunities in the future. Consider a person who encounters an extremely profitable criminal opportunity today —so that he will not be deterred even if the expected ex-ante penalty for this crime is maximal—, and that he is almost certain to never encounter profitable criminal opportunities in the future. In this case, inducing the criminal to abandon his crime today by fully excusing him for his abandoned attempt is the optimal solution. This person is not ‘dangerous’, not because he lacks the intent to commit crime, but because he lacks future criminal opportunities. Therefore, it is best to prevent criminal harm through marginal deterrence today, as well as save the cost imprisoning this person. In reality, of course, it is impossible to identify the likelihood with which various attempters will encounter profitable criminal opportunities in the future. But, as this discussion demonstrates attempts are not perfect signals of future dangerousness, even if criminals’ preferences remain constant over time, as long as some attempters’ face some probability of not encountering a profitable criminal opportunity in the future.

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case, the criminal may not possess the necessary benefit or the necessary talent\textsuperscript{107} to make the crime profitable ex-ante.\textsuperscript{108} He may have initiated the crime despite this due to temporary miscalculations, optimism, or lack of self-control.\textsuperscript{109} At the least, it seems intuitively true that the probability with which an abandoning person will recidivate is smaller than the probability with which a non-abandoning person will recidivate (if not imprisoned). Therefore, expected incapacititative benefits associated with eliminating recidivism are not as large as the argument against the Defense would suggest.

Second, even if the person initially possesses the necessary desire and talent to make his criminal plan profitable ex-ante, the act of abandoning and receiving a penalty reduction for it may alter his preferences and reduce his benefits from criminal conduct.\textsuperscript{110} A person who sets out to murder a person, and later repents his initial intentions and thoughts, for instance, has presumably experienced a shift in his preferences towards the act of murder. Therefore, the person would be less likely to recidivate and incapacititative benefits from imprisoning him would be lower than one would otherwise think.

Describing the third weakness in the argument against the Defense requires noting that the only alternative to severely punishing an attempter who withdraws is not fully excusing him. He can be punished less severely than the person who completes his attempt. As discussed in the previous part, less severe penalties for abandonment of crimes produce a marginal deterrence effect.\textsuperscript{111} A similar effect is unlikely to be gained by reducing the punishment of completed attempts.\textsuperscript{112} Accordingly, even if a person who abandons his criminal plan and a person who completes his attempt were equally dangerous, the incremental net-benefit from increasing the imprisonment of the latter would still be greater than the incremental net-benefit from increasing the imprisonment of the former for the same amount of

\textsuperscript{107} Shavell, Punishment of Attempts, supra note 6 (providing a deterrence based rationale for why less talented individuals ought to be punished less severely).

\textsuperscript{108} See Part III identifying conditions under which crime is profitable ex-ante for the potential offender.

\textsuperscript{109} See supra notes 68-70 and 91, and accompanying texts.

\textsuperscript{110} See Mungan, supra note 36, at 209-13 (discussing shifts in preferences and proposing ways to incorporate these shifts into the standard law and economics analysis of crime.).

\textsuperscript{111} See Part II and Part III supra.

\textsuperscript{112} See Shavell, Punishment of Attempts, supra note 6, at 455 (making a similar point).
time. This is because, the incapacitative benefits and ex-ante deterrence effects of punishment would be the same for the two types of individuals, but there would be an additional cost – in the form of loss of marginal deterrence, as demonstrated in Parts II and III – from severely punishing individuals who abandon their crimes.

The first and second arguments outlined above rely on the nature of the information, relating to the offender’s dangerousness, produced by the act of abandoning. In particular, the operating assumption in these arguments is that an abandoned attempt provides ‘weaker’ information compared to a completed attempt concerning the dangerousness of the attempter. Information is ‘weaker’ in the sense that we are not as certain about the dangerousness of the offender as we are when the offender has completed his attempt. An intuitive corollary is that the optimal reductions in the penalty for abandonment ought to hinge on the nature of the information revealed by the abandonment, and that it ought to be inversely related to the strength of the information revealed by the act of initiating and later abandoning the crime.

This criterion can be applied to Attempt 2 and Attempt 3 described in the introduction. Intuitively Attempter 2’s strategic abandonment supplies strong information regarding his dangerousness, because he demonstrates that his abandonment is not due to some reduction in his criminal tendency. On the other hand, Attempter 3’s emotions towards his victim and his repentance signals that he has initiated a criminal plan while acting impulsively and/or irrationally, and that his attempt has shown him that he does not possess the mind-set necessary to murder another person. Hence, it appears reasonable to assume that Attempter 2 is less likely than Attempter 3 to recidivate.

113 The third argument, on the other hand, suggests that even assuming arguendo that all attempters reveal the same type of information, it is optimal to punish abandoned attempts less severely than completed attempts. Offenses for which the punishment is maximal are discussed further in Part V.B., infra.
V. REMARKS AND EXTENSIONS

The preceding parts of this Article demonstrate that the optimal sentence reduction for abandonment of an attempt depends on, among other things, the trade-off between marginal deterrence benefits and ex-ante deterrence costs. If the abandonment is caused by unforeseeable changes in the criminal’s tendencies to commit crime, then, *ceteris paribus*, the incremental net benefit from sentence reductions is higher, and therefore such abandonments ought to be punished less severely. Furthermore, because incapacitative benefits from imprisonment are inversely related to the expected dangerousness of the offender, the mitigation in penalty for abandonment ought to be greater when the abandoned attempt provides weak information regarding his dangerousness.

This part first compares the normative implications of the analysis presented in the preceding parts to existing laws on abandonment. Then, it identifies a number of issues that can benefit from a careful analysis in future research, and considers and responds to potential criticisms.

A. Normative Implications Compared to Laws on Abandonment

A brief review of existing law is necessary to compare and contrast them with the normative implications of my analysis. As briefly discussed in the introduction, there is no consensus among jurisdictions on the law of abandoned attempts.\(^{114}\) Although abandonment was not a defense to attempts in common law, today it can affect the defendant’s liability in one of two ways.\(^{115}\) First, the abandoning defendant may escape liability under the theory that he did not possess the requisite intent for the attempt, because “where the accused has changed his mind, it would be only just to interpret his previous intention where possible as only half-formed or provisional, and hold it to be insufficient mens rea.”\(^{116}\) Second, in some jurisdictions

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\(^{114}\) See *supra* notes 21-34 and accompanying text.

\(^{115}\) See *supra* notes 22-26 and accompanying text.

\(^{116}\) See *supra* notes 23-24.
abandonment is a defense\textsuperscript{117} if it occurs “under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”\textsuperscript{118} An abandonment that meets these criteria is generally a complete defense\textsuperscript{119} rather than a mitigating factor for purposes of punishment.\textsuperscript{120}

Contrary to existing laws, my analysis suggests that, as a general matter, all abandoned attempts, without regard to whether they would be classified as voluntary or involuntary, ought to potentially be punished less severely than completed attempts. Furthermore, an abandonment need not be treated either as a full excuse or no defense at all. Optimal punishment schemes require abandonments to be treated as mitigating factors in punishment, and require that the magnitude in mitigation be determined by considering factors discussed above.

These differences should not leave the impression that the normative implications of my analysis and existing laws are completely divergent. They are not. In fact, they have many similarities. In particular, the complete renunciation of criminal purpose requirement in many jurisdictions allowing a defense can be interpreted as a proxy for identifying the defendant’s dangerousness. Similarly, the necessity of voluntary renunciation is often interpreted as a requirement that there be no ‘outside cause’\textsuperscript{121} or ‘extraneous factor’\textsuperscript{122} motivating the abandonment. This requirement can be thought of as providing a proxy for the foreseeability factor that I have identified, since, intuitively, outside factors are more foreseeable than internal changes, including changes of heart.

This brief comparison suggests that the law has equipped itself with instruments intended to serve purposes similar to those identified by my economic analysis, but that it has chosen instruments that are too blunt. In particular, most laws create categories of abandonments

\textsuperscript{117} See supra note 26.
\textsuperscript{118} Model Penal Code § 5.01(4).
\textsuperscript{119} See supra note 28.
\textsuperscript{120} See supra note 29.
\textsuperscript{122} See LAFAVE, supra note 3 (citing Wis.Stat.Ann. § 939.32(2)).
that are too rigid by requiring that they either provide a full excuse or no defense at all.

This claim is supported by the existence of cases where a strict reading of the law requires one verdict, but the court produces the opposite one.\textsuperscript{123} Consider for instance \textit{Commonwealth v. McCloskey}\textsuperscript{124} and \textit{McNeal v. State}\textsuperscript{125} which represent deviations from the strict reading of the law in the two possible directions.

In \textit{Commonwealth v. McCloskey}, a prison inmate “scaled a fence within the prison walls that led to the recreation yard and then to the prison wall.”\textsuperscript{126} The inmate stated that his abandonment was motivated by a desire to “not shame [his family] anymore.”\textsuperscript{127} Although “abandonment [was] not recognized as a defense”\textsuperscript{128} the inmate’s conviction for attempted prison escape was “overturned on the questionable ground that [his] actions demonstrated that he was still only contemplating an escape, but had not yet begun attempting the act.”\textsuperscript{129} Hence, the court used a rather favorable interpretation of the law of attempts for the appellant to overturn his conviction.

The Court of Appeals of Michigan interpreted the law in the opposite direction in \textit{McNeal v. State} where the defendant, although initially intent on raping the victim, desisted after talking with her for over an hour.\textsuperscript{130} Subsequently the “[d]efendant was convicted by a jury of attempted second-degree criminal sexual conduct.”\textsuperscript{131} The Court of Appeals noted that voluntary abandonment was a recognized defense in Michigan based on precedent established in \textit{People v. Kimball}.\textsuperscript{132} But, despite this, the Court upheld the defendant’s conviction\textsuperscript{133} based

\begin{footnotesize}
\begin{enumerate}
\item See Eisenberg, \textit{supra} note 5 at 71 (discussing how and why courts may inconsistently apply rules).
\item 341 A.2d 500 (Pa. Super. Ct. 1975). \textit{See also} \textit{Dressler, supra} note 3, at 411, n. 180 (interpreting the grounds for the overturning of the defendant’s conviction as “questionable”).
\item 152 Mich. App. 404.
\item \textit{Id.} at 501.
\item \textit{Dressler, supra} note 3, at 411, n. 180.
\item \textit{Id.}
\item 152 Mich. App. 404, 408-409.
\item \textit{Id.} at 407.
\item \textit{Id.} at 414. Although the defense was not made available by statute, \textit{People v. Kimball}, 109 Mich. App. 273, 286 (1981) held that “voluntary abandonment is an affirmative defense to a prosecution for criminal attempt”.
\item 152 Mich. App. 404, 417
\end{enumerate}
\end{footnotesize}
on the supposition that a “the victim’s use of her wits in keeping defendant talking and in convincing him to let her go”\(^{134}\) “may constitute ‘unanticipated difficulties’ or ‘unexpected resistance’”\(^{135}\) which would make the abandonment involuntary under *Kimball*.\(^{136}\)

It is impossible to know what exactly led to these aggressive interpretations, but it is plausible that an intuitive notion of justice required that the defendants in *Commonwealth v. McCloskey* and *McNeal v. State* be punished, but less severely than the full punishment for a completed attempt.\(^{137}\) In cases where this is not an option, the decision maker has to choose between full punishment or a full excuse, and may be inclined to choose that one which is closest to what he finds is the just punishment for the defendant, even if the verdict cannot be supported by a strict reading of the law.\(^{138}\)

In sum, the rigid categories created by the law of abandonments may be pushing decision makers to bend or aggressively interpret the laws in a way to get closer to the decision they find intuitively just. The existence of this problem may be interpreted as a sign that the law of abandonments has not yet evolved to its optimal form. Implementing the proposed punishment schemes in this Article appears to be a step in the right direction, especially since these punishment schemes further the goals of optimal deterrence and incapacitation.

\(^{134}\) *Id.* at 416.

\(^{135}\) *Id.* at 417.

\(^{136}\) *Id.*

\(^{137}\) In *McNeal v. State* “the evidence indicated that defendant put the victim on the couch, laid himself down next to her, kissed her neck and lips, and touched her thighs and stomach. Because defendant never touched the victim’s intimate parts, he could not have been convicted of the completed crime of second-degree criminal sexual conduct” *Id.* at 414. Many people after confronting this type of fact pattern feel that the defendant should be punished for his acts, but presumably less than a person who completes the criminal sexual conduct.

\(^{138}\) See *supra* note 123. There are other ways judges can indirectly alter the defendant’s punishment to approximate their notions of justice more closely. For instance, voluntary abandonment may signal that the offender is remorseful, and manifestations of remorse can be used as mitigating factors in a number of states. See Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 745 (2012) (discussing how states allow remorse to be used as a mitigating factor). See also Mungan, *supra* note 36, at 190 (reviewing previous studies regarding how judges exercise discretion while sentencing remorseful and apologetic offenders and concluding that “manifestations of remorse, such as apologies, can affect the way judges exercise discretion in sentencing criminals. In fact, a number of previous studies discuss how judges are tempted to impose shorter sentences when they are convinced that an offender is remorseful.” (footnotes omitted)).
B. On the Use of Escalating Penalty Schemes to Mitigate the Loss in Incapacitative Benefits

The uncertainty related to whether or not there are significant incapacitative benefits from punishing an individual who abandons his crime may be addressed through the use of escalating punishment schemes.\footnote{A punishment scheme is escalating if the punishment for the second offense is greater than the punishment for a subsequent offense. There is a large law and economics literature on escalating penalties, and despite this, there is no consensus on the conditions under which escalating penalties are optimal. See, e.g., Murat C. Mungan, \textit{Repeat Offenders: If They Learn We Punish Them More Severely}, 30 INT'L REV. L. & ECON. 173 (2010) (escalating penalty schemes can be optimal if offenders learn how to evade the detection mechanisms employed by law enforcers upon being convicted or committing crime); Winand Emons, \textit{A Note on the Optimal Punishment for Repeat Offenders}, 23 INT'L REV. L. & ECON. 253 (2003) (“[t]he optimal sanction scheme is decreasing rather than increasing in the number of offenses” under conditions identified by the author); Polinsky & Shavell, \textit{supra} note 66, at 438 (“only if deterrence is inadequate is it possibly desirable to condition sanctions on offense history”).} The main virtue of using escalating punishment schemes would be to cause marginal deterrence while preserving benefits similar to those that would be generated by the incapacitation function of imprisonment.\footnote{Escalating penalty schemes could also be used to reduce imprisonment costs. See, e.g., Murat C. Mungan, \textit{A Behavioral Justification for Repeat Offender Laws}, INT'L REV. L. ECON. (Forthcoming).} Given this, the main trade-off affecting the optimality of the Defense would be between its ex-ante and marginal deterrence effects outlined and discussed in Part III.

To exemplify how escalating penalty schemes could be used, consider a penalty scheme that provides a penalty reduction for abandoned crimes, but increases the penalty for any subsequent crime. This scheme generates marginal deterrence, because whenever a criminal enters the ‘bad state’, he will be inclined to abandon his crime. The scheme also reduces recidivism by increasing the penalty for future crimes that may be committed by potentially dangerous offenders and thereby causing specific deterrence.\footnote{See the references cited in \textit{supra} note 139 describing how recidivism can be reduced by increasing the penalty for repeat offenders.}

One might object to the latter point by arguing that the criminal might be undeterrable and by delaying his punishment, we may be providing him with an opportunity to commit crime in the future. There is an important flaw in this argument. If the person were truly undeterrable, then he would not be affected by marginal deterrence either, and therefore would not abandon his criminal activity due to the
prospect of receiving a lower punishment. Thus, if the person is undeterrable he will not be able to invoke the Defense, and the Defense will not cause recidivism as claimed. Therefore, the applicability of this argument appears to be limited to a very special class of offenses, namely those for which the penalty is already maximal. If the penalty for the completed attempt is maximal, the subsequent commission of the crime cannot be punished more severely, and therefore recidivism cannot be reduced further. For these types of offenses, if the penalty for the offense was set efficiently to begin with, it may indeed be best to not allow the Defense.\textsuperscript{142}

Perhaps a more important objection to the escalating punishment scheme may question why the penalty for the initial crime was not set at the level that is sufficient to deter the dangerous offender, especially, if we believe we can deter him from recidivating by punishing him severely for his second offense. The law and economics literature on the optimal punishment of repeat offenders offers several answers to this question, although none appear to be completely comprehensive.\textsuperscript{143} One of the most intuitive explanations is provided by Professor Miceli:\textsuperscript{144}

An enforcer wishes to deter a particular undesirable act but is unsure about what level of punishment it will take because offenders vary in their gains from committing the act. One approach would be to set a high initial punishment, but this policy would be costly to implement if some offenders are, for whatever reason, not deterred. Thus, a cheaper strategy may be to set a low initial punishment, and then to raise it for those who commit the act, thereby revealing their higher

\begin{footnotesize}
\footnote{This conjecture is formed through a somewhat subtle economic reasoning. The fact that the punishment for the attempt is maximal signals that the incremental benefit from increasing expected costs to the potential offender off-sets, rather than being equal to, the incremental cost of increasing these expected costs. In economics jargon, it is likely that we are observing a corner solution to begin with. This signals that the potential gains from marginal deterrence are unlikely to bump the incremental costs from increasing the expected penalty above the incremental benefit from increasing the same.}

\footnote{See supra note 139.}

\end{footnotesize}
valuation. Under this escalating scheme, some early crime is tolerated in order to save on punishment costs.

Whether or not the existing law and economics literature provides convincing arguments for the use of escalating punishments can be debated. But, as a practical matter, repeat offender laws exist,\(^{145}\) and there is very often room to implement escalating penalty schemes that increase the penalty for future crimes for people who have abandoned their attempts.

C. On Criminals’ Ignorance of Laws

Most economic analyses of criminal law assume that laws affect potential offenders’ incentives by adjusting the costs and benefits of committing crime. Another, less explicit and perhaps antecedent, assumption is that potential offenders are well informed of the details of criminal laws. Some scholars have recently questioned the validity of this assumption, and have argued that in many circumstances criminals are unaware or imperfectly informed about the applicable criminal laws.\(^{146}\) Because the model presented in parts II and III also makes these assumptions one may wonder whether the normative implications that are based on this model are reliable.

There is a very simple, yet powerful, defense against such criticisms of the assumption that all criminals are informed of laws governing abandonment. The particular law governing abandonment of attempts should not have any incentive effect on criminals that are truly uninformed of these laws. Therefore, the ex-ante as well as the marginal deterrence effect of laws on abandonment on these individuals is negligible. The incentive effects on these individuals can justifiably be ignored when discussing effects on social welfare.\(^{147}\) If it is further assumed that there is a proportion of offenders, even if this proportion is small, whose incentives are affected by the particular law governing abandonment of attempts, then the laws can justifiably be

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\(^{145}\) See, e.g., those that are discussed in Mungan, supra note 36, at 187-88.


\(^{147}\) This has no effect on whether imprisonment costs and incapacitative benefits from punishing offenders ought to be considered.
structured to provide proper incentives only to these individuals. Hence, the normative implications derived by the models presented in this Article are still valid when one assumes that there are individuals who are uninformed of the laws, and another, perhaps smaller, group of individuals whose incentives are affected by the particular law on abandoned attempts.

D. On Interrupted Attempts

This Article is mainly concerned with the properties of optimal punishment schemes for abandoned attempts. Although it does not consider optimal punishments for interrupted attempts, one can form conjectures regarding this issue by relying on the insights provided in the preceding parts.

When attempts are interrupted one cannot ascertain whether the attempter would have completed it or whether he would have abandoned it. This uncertainty, intuitively, makes interrupted attempts conceptually a hybrid between completed and abandoned attempts. The facts surrounding the interruption might inform the fact finder about how close that particular interrupted attempt is to one category versus the other. However, in many cases this type of information will not be available. In these cases, priors regarding the likelihood with which an attempt would have been completed but for the interruption become important. To the extent that this prior is high, the interrupted attempt ought to be punished with a sanction close to the corresponding sanction for completed attempts.

If courts made no errors in categorizing attempts as interrupted versus abandoned, then interrupted attempts would be hybrids only in terms of their information revealing features. Shavell, Optimal Use of Nonmonetary Sanctions, supra note 6, makes a similar point. Id. at 1251 (“[P]unishing interrupted attempts less severely than acts that result in harm may be advantageous. Since interrupted attempts may later be abandoned or fail, there is less evidence of the dangerousness of interrupted attempts and less reason for sanctioning them than acts that actually do result in harm.”). However, they would be similar to completed attempts in terms of their inability to generate marginal deterrence. If, however, courts make errors in categorizing attempts, then a penalty reduction for interrupted attempts would produce a small marginal deterrence effect, because the offender would be punished less severely when he abandons his crime but is subsequently punished for an interrupted attempted due to the court’s erroneous categorization of the attempt.